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Supreme Court of the United States

October Term, 1997

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Petitioners,

vs.

THE UNITED CENTER, A JOINT VENTURE f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S BRIEF IN REPLY

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INTRODUCTION

In accord with Rule 15(6) of the Rules of the Supreme Court that states "[a]ny petitioner may file a reply brief addressed to new points raised in the brief in opposition," the Peanut Vendors have attempted to limit their discussion in this reply brief to only new points raised in the Respondent's Brief In Opposition.

REASONS FOR GRANTING THE WRIT

I. BY NOT AFFORDING THE PEANUT VENDORS A FACTUAL HEARING TO PROVE THE EXISTENCE OF A RELEVANT GEOGRAPHIC MARKET AT THE UNITED CENTER, THE LOWER COURT VIOLATED THIS COURT'S PRECEDENTS.

In its Brief In Opposition, the United Center emphasizes the appellate court's holding that no relevant geographic market exists for food concession sales at the United Center. Two times in the course of its 12-page brief, the United Center approvingly quotes the appellate court's determination that the United Center does not constitute a "meaningful" "geographic area" for antitrust purposes (Respondent's brief, pp. 2-3, 9). The appellate court's precise words on this matter are as follows:

> No one argues that the United Center is monopolizing the market for snack food in near west Chicago, because such an argument would be ludicrous on its face. The United Center is obviously not monopolizing the market for peanuts: it is staying strictly out of the peanut business. True, its ban means that those with a craving for peanuts must satisfy it either before or after the game, but both price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Centers policies. (Petitioners' Appendix A, p. 5a.)

It is the Peanut Vendors' intention to show that, absent a factual hearing on the matter, the lower court was mistaken to hold that no relevant *geographic* market exists at the United Center. To some extent in their original Petition for Writ of Certiorari, the Peanut Vendors have already dealt with the serious legal errors committed by the appellate court in having ruled that no relevant market exists in this case. As a result, there is a slight overlap in this discussion with the Petition itself. On the other hand, the Petition did not focus on the specific issue of a proving the existence of a relevant *geographic* market at the United Center; it merely focussed on the question of proving a

relevant market in general.

A. This Court's Precedent In *Eastman Kodak* Requires that the Peanut Vendors Be Afforded the Opportunity to Present Factual Evidence Regarding the Existence of a Relevant Geographic Market at the United Center.

In *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), this Court recognized that market definition could "be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Kodak* at 482. Here, however, the lower court made no factual inquiry into the existence of a relevant geographic market. Instead, the lower court simple declared, without any analysis and based on absolutely no evidence, that "both price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Centers policies." (Petitioners' Appendix A, p. 5a.)

Yet market realities suggest that there exists a market for food concession sales at the United Center. The primary evidence of this is the existence of monopoly prices for food concessions sold by the operators of the United Center. The prices at the United Center for normal snack food like popcorn, pretzels or a hotdog are 300-to-400 percent higher than in competitive markets. To be sure, the exact prices of food sold at the United Center has not yet been entered into evidence in this case, but the Peanut Vendors have alleged in their Complaint that the United Center possesses monopoly power over food concessions at the United Center (Complaint, para. 52). And it is common knowledge that prices for food concessions at most professional sporting events are monopolistic.

Given the monopoly prices charged by the operators of the United Center, it can be said as a matter of legal analysis that the United Center possesses monopoly power in food concession sales at the United Center. Monopoly power refers to the unilateral ability to reduce output and increase prices. *Kodak* at 485. If the market for food concession sales included all of Chicago, as suggested by the United Center in its brief, Respondent's brief, p. 7, it is difficult to explain why the United Center is able to charge supracompetitive prices.

Indeed, the Department of Justice's merger guidelines propose as a rule of thumb that market power is present if a seller has the ability to maintain price at a level five percent higher than the competitive level for an extended period of time. Although the specific five-percent test of the guidelines should

not be used uncritically, it is generally accepted as a rough measure of market power, even in non-merger cases. The United Center's supracompetitive prices easily satisfy the guidelines' test.[1]

But even apart from the existence of supracompetitive prices, there are other practical realities that suggest that a factual inquiry is needed to determine whether a relevant market for food concessions exists at the United Center. This Court has defined a relevant geographic area as a "market area in which the seller operates, and to which the purchaser can practicably turn for supplies" *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Thus, to determine the existence of a proper geographic market it is necessary to inquire where the patrons of the United Center consider their effective boundaries for buying snack food while attending a game at the United Center if the monopolist United Center raises its prices.

It is the Peanut Vendors' contention that most people don't think ahead of time to buy snack foods but wait until they are at the stadium to buy their snack food for that particular night's game. Thus, it is the Peanut Vendors' belief that the relevant market serving patrons at the United Center is the United Center itself and the public sidewalks immediately surrounding the United Center, on which the peanut vendors have historically sold their wares.

This Court held in *Kodak* that antitrust claims should be resolved "on a case-by-case basis, focusing on the 'particular facts disclosed by the record." *Kodak* at 466-67. But the Peanut Vendors have not been allowed to present a factual record in this case. All the Peanut Vendors are asking for is a chance to prove the existence of a relevant geographic market at the United Center, one based on commercial realities.

B. The Appellate Court Based Its Determination That No Relevant Geographic Market Existence On Matters Outside the Four Corners of the Complaint In Violation Of This Court's Precedent.

In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court held that a dismissal on a 12(b)(6) motion is appropriate only where it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* at 45-46. In addition, in determining whether to grant a motion to dismiss a complaint, a federal district court must accept the allega-

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1. U.S. Dep t of Justice & Federal Trade Comm. 1992 Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) P 13,104.

tions in the complaint as true and construe them in the light most favorable to the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In the case at hand, however, the appellate court based its decision to dismiss on matters outside the four-corners of the complaint. The appellate court held that no one comes to the United Center to buy food. ("[P]eople do not go to the United Center to buy food," Petitioners' Appendix A, p. 5a.) This assertion by the court is not only untrue; it is also contrary to the allegations in the Peanut Vendors' Complaint. Hundreds of thousands of patrons buy snack food at the United Center. As the Peanut Vendors have alleged, the independent peanut vendors themselves annually sold over $500,000 in snack food to United Center patrons (Complaint, para. 20). Truth is, millions of dollars in snack food is sold at the United Center every year. It is of course true that the major purpose for patrons coming to the United Center is not to purchase food. Nevertheless, the market for food concessions at the United Center is a substantial one, involving hundreds of thousands, if not millions, of customers and tens of millions of dollars every year.

At this point, it is appropriate to confront the appellate court's explicit suggestion in its opinion that the United Center as a single entity is too small or insignificant a place to be regarded as a "meaningful" geographic market for antitrust purposes. The appellate court wrote as follows:

> [B]oth price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Centers policies. (Petitioners' Appendix A, p. 5a.)

In truth, however, there is no geographic size requirement for a relevant geographic market and no preordained market size to make a particular geographic market "meaningful." Indeed, the determination of a the existence of a relevant market has nothing to do with the market's mere square footage. A relevant market has been defined as the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market. Lawrence A. Sullivan, *Handbook Of The Law Of Antitrust* 156, at 445-47 (1977). It can be as big as the country or as small as the United Center. On this point, it is revealing to note that the appellate court in holding that the United Center was not a "meaningful" geographic market failed to cite any Supreme Court case law to support its assertion.

As an example of a single entity being held to constitute a relevant geo-

graphic market for antitrust purposes, this Court held in *United States v. Terminal R.R Ass'n*, 224 U.S. 383 (1912) that a single railroad terminal constituted a relevant geographic market for antitrust purposes under a bottleneck theory. In *Terminal*, a group of railroads servicing the St. Louis area also owned the only railroad terminal that provided access to the city. The terminal owners used their monopoly power over the terminal to overcharge other railroads for access to the terminal and thereby gain a competitive advantage in the downstream market for railroad services. The effects of the monopoly leveraging that occurred at the railroad terminal affected the entire St. Louis community. Here, too, the effects of the United Center's monopoly leveraging affects the entire Chicago area community: among other things, it prevents patrons who want to see an NBA basketball game or NHL hockey game in person from buying snack foods at non-monopoly prices.

II. THE UNITED CENTER'S ADMISSION THAT IT REGARDS ITSELF AS A MONOPOLIST IN THE LIVE PRESENTATION OF NBA BASKETBALL AND NHL HOCKEY BUTTRESSES THE PETITIONERS' CLAIM THAT IT IS ENTITLED TO A HEARING

The United has made an astonishing admission in its brief by acknowledging, for the first time in this case, that it does, in fact, possess monopoly power in the live presentation of NHL hockey and NBA basketball in the Chicago area. In the appellate court, the United Center had vigorously argued that the United Center did not possess a legally cognizable relevant market in the live presentation of NHL hockey and NBA basketball in the Chicago market, that the United Center competed with all other entertainment facilities in Chicago, and that without a relevant market in NHL hockey or NBA basketball there could be no relevant market in food concession sales at the United Center. (Defendant's Appellate Brief, pp. 7–11). Now, the United Center admits it possesses a monopoly in the live presentation of NHL hockey and NBA basketball in the Chicago area. The United Center writes as follows:

> The Peanut Vendors now contend they should have been given an evidentiary hearing in the trial court to prove that presentation of live Bulls and Blackhawks games in Chicago constitutes a standalone relevant market that is being monopolized by the United Center. *Neither the trial court, however, nor the appellate court, nor the United Center have ever disputed this issue.* (Emphasis added) (Respondent's Brief, p. 2.)

In one respect, this admission is helpful to the Peanut Vendors' case, for

it seems to take the issue of the United Center being a monopolist in the live presentation of NHL hockey and NBA basketball off the table as an issue in dispute. In another respect, the belated admission is quite troubling, for it seems to undermine the legitimacy of the appellate court's earlier decision. The United Center's admission that it is a monopolist is now in direct conflict with the appellate court's decision, in which that court upheld the 12(b)(6) dismissal of the Peanut Vendors' Complaint in large part on the grounds that the United Center was not a monopolist in any legally cognizable relevant market.

The appellate court held that the United Center is not a unique entity and that there exist "other comparable places in the Chicago area" (Petitioner's Brief, Appendix A at 6A). The clear implication of the decision was that there was nothing distinct about the activities of the United Center that could possibly distinguish it from other places in the Chicago area. Now, however, the United Center readily admits that it is a unique entity in its possession of monopoly power in the live presentation of NHL hockey and NBA basketball in the Chicago area.

The effect of the United Center's admission is to significantly buttress the Peanut Vendors' argument that it should be entitled to prove the existence of a relevant market in food concession sales at the United Center. Based on the admission, it is now indisputable that millions of people each year who desire to watch a Chicago Bulls or Blackhawks game in person, an activity for which, by the United Center's own admission, there are no good economic substitutes in the Chicago area, have no choice but to come to the United Center to do so. A significant percentage of these patrons buy food concessions in and around the United Center to enjoy during the games. The issue thus becomes, what is the market to serve these people who desire to buy a snack food to enjoy during the game? As has previously been discussed , this issue is a fact question that should be determined by a trier of fact. So far, however, the Peanut Vendors have been denied the right to present any evidence on this matter.

III. THE UNITED CENTER'S ANALYSIS IN ITS BRIEF IN OPPOSITION OF THE THREE SUPREME COURT CASES IT DEEMS MOST RELEVANT TO THIS CASE ARE ALL SERIOUSLY FLAWED IN THEIR LOGIC AND DO NOTHING TO SUPPORT THE UNITED CENTER'S CONTENTION THAT A FACTUAL HEARING SHOULD NOT BE AFFORDED THE PLAINTIFFS IN THIS CASE.

A. *BROWN SHOE*

In Part I of its Brief In Opposition, the United Center argues that, based on this Court's analysis in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), no relevant market exists in the market for food concession sales in and around the United Center. (Respondent's Brief, pp. 3–6) But at this point in the proceedings, at a time before a factual hearing has been afforded the Peanut Vendors, the United Center's analysis of the *Brown Shoe* indicia is irrelevant and premature.

The *Brown Shoe* indicia for determining the existence of a relevant market require a series of factual inquiries and analyses. In relying on *Brown Shoe*'s indicia, the United Center is jumping the gun, arguing detailed factual evidence regarding the existence or lack of existence of a relevant market when at this point this case is about the lower courts' refusal to allow the Peanut Vendors to actually present factual evidence regarding the existence of a relevant market.

If given the opportunity, it is the Peanut Vendors' intention to prove, based on the *Brown Shoe* indicia and on an economic analysis of prices for food concession sales at the United Center, that a relevant market exists in food concessions in and around the United Center. But so far the Peanut Vendors have not been given the opportunity to do this. The *Brown Shoe* indicia will no doubt become extremely relevant to this case when the Peanut Vendors are afforded the opportunity to present factual evidence to prove the existence of a relevant market.

B. *KODAK*

In Part II of its brief, the United Center argues that this Court's holding in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992) does not require a factual hearing to be afforded the Peanut Vendors. (Respondent's Brief, pp. 6–8) In attempting to explain why *Kodak*'s requirement affording antitrust plaintiffs a factual hearing is inapplicable to this

case, the United Center argues that the Peanut Vendors have not offered any reasons as to why food concession sales at the United Center should be regarded as a relevant market. The United Center writes as follows:

> Unlike *Eastman Kodak*, the Peanut Vendors offer no analysis of why the "commercial realities" might require a court to regard snack food consumption at the United Center either as a separate product from the sports event for which the consumer buys a ticket, or as a separate product from snack food sold to that consumer anywhere or anytime other than at a Bulls or Blackhawks game. (Respondent's Brief, p. 7.)

And elsewhere:

> [T]he Peanut Vendors make no attempt to demonstrate what it is about the concept of snack food consumption at Bulls and Blackhawks games that would require an evidentiary hearing in order to comprehend whether snack food consumption at the United Center is a stand-alone relevant market. (Respondent's Brief, p. 7.)

Here, the United Center is arguing that the reason *Kodak*'s requirement affording antitrust plaintiffs the opportunity to have a factual hearing to prove the existence of a relevant market is inapplicable to this case is that the Peanut Vendors have not offered any evidence of "commercial realities" to prove the existence of a relevant market. But of course the only reason the Peanut Vendors have not yet presented such evidence is that they have been precluded from doing so.

The United Center's logic puts the Peanut Vendors in a classic Catch-22 situation. In manufacturing this argument, the United Center is simply trying to confuse this Court. Assuming a relevant market has been properly pled in this case, and there has been no suggestion by any party or by either lower court to the contrary, there is no good reason that this Court's holding in *Kodak* should not apply to the Peanut Vendors.

C. *JEFFERSON PARISH*

Finally, in Part III of its brief, the United Center argues that *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) supports the appellate court's analysis in this case. (Respondent's brief, pp. 8–11) But in discussing *Jefferson Parish*, the United Center blatantly misrepresents this Court's holding in that case and misstates the essential characteristics for an unlawful tying arrangement.

In its discussion of *Jefferson Parish* the United Center writes:

> [A] tying agreement is not illegal if the seller has significant market power only in the tying product, but not also in the tied product. (Respondent's Brief, p. 10.)

The above assertion is a radical misrepresentation of the law of tying. This assertion in no way, shape, or form corresponds with the actual law of tying as enunciated by the Court in *Jefferson,* or any other case for that matter. It would be inappropriate here to review once again the Court's actual holding in *Jefferson* (see discussion in Petitioners' brief, pp. 20–25), but suffice it to say that the United Center's assertion is contrary to the test that Justice O'Connor outlined in her Concurrence in *Jefferson* to determine the illegality of a tying arrangement, in which she offered the following three factors: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct. See *Jefferson* at 37-40.

It cannot be emphasized strongly enough that no where has this Court ever said that a tying arrangement is illegal *only if* the monopolist possesses significant market power in both the tying and tied product. In short, The United Center's discussion in its brief of this Court's holding in *Jefferson* is specious and without merit.

CONCLUSION

It was fundamental legal error for the appellate court not to afford the Peanut Vendors the opportunity to have a factual hearing in this case. A court simply may not ignore or refuse to define an economically relevant market. Market definition is a matter of economic realities. *Kodak* at 482. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe* at 336. The appellate court completely lost sight of that salient principle and went badly astray.

For the foregoing reasons, the United Center respectfully requests that this Honorable Court grant the Peanut Vendors' petition for a writ of certiorari.

Respectfully submitted,

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